Supreme Court, U.S.
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No. 99-745

In The

Supreme Court of the United States

PATRICIA SCANLON,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Georgia

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT

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QUESTION PRESENTED

Whether this Court should decline to grant certiorari to review the Georgia Appellate Court's precise application of this Court's clearly established precedents, and the lower court's conclusion that Petitioner's affirmative response to the arresting officer's "limited and focused inquiries . . . necessarily attendant to the legitimate police procedure" was "not prompted by an interrogation within the meaning of Miranda, and therefore the absence of Miranda warnings does not require suppression of [that statement] at trial."

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PART I.

STATEMENT OF THE CASE

Petitioner was convicted by a jury of one count of driving under the influence on July 24, 1998. Petitioner received a twelve-month sentence, with four days to be served in confinement and the balance to be probated. Petitioner's conviction and sentence were affirmed on direct appeal. *Scanlon v. State*, 237 Ga. App. 362, 514 S.E.2d 876 (1999). Petitioner's Motion for Reconsideration was denied by the Court of Appeals of Georgia on March 30, 1999. Petitioner applied for certiorari to the Supreme Court of Georgia, and the same was denied on July 2, 1999. Petitioner's Motion for Reconsideration was denied by the Supreme Court of Georgia on July 30, 1999. Petitioner now files this Petition for Writ of Certiorari.

PART II.

STATEMENT OF THE FACTS

Based on the record before it, the Court of Appeals of Georgia found that:

> [Petitioner] was driving her car on Georgia 400. A police officer stopped her after he saw her car moving slowly, causing traffic congestion, and weaving in its lane. Based on her physical appearance and the manner in which she performed various field sobriety tests, the officer arrested [Petitioner] for DUI. The officer placed handcuffs on [Petitioner], put her in the rear seat of the patrol car, and called a tow truck. Although [Petitioner] had not been advised of her *Miranda* rights, the officer read an implied

> consent notice to her. [Petitioner] verbally consented to take a chemical breath test and was taken to the local detention center where she was tested on an Intoxilyzer 5000.
>
> Before trial, [Petitioner] moved to suppress or exclude the breath test results and evidence that she consented to the breath test. [Petitioner] asserted that admission of this evidence would violate her federal and state privilege against self-incrimination, her state constitutional right of due process, and her statutory right against self-incrimination because she was never advised of her *Miranda* rights after her arrest. After an evidentiary hearing, the trial court ruled that the breath test results and evidence that [Petitioner] consented to the breath test were admissible.

Scanlon v. State, 237 Ga. App. 362, 514 S.E.2d 876 (1999).

PART III.

REASONS FOR NOT GRANTING THE WRIT

I. THIS COURT SHOULD DECLINE TO GRANT CERTIORARI TO REVIEW A QUESTION NOT PRESENTED BY THE FACTS OF PETITIONER'S CASE.

While Petitioner claims that her case "presents an example of the statutory conflict between Ga. Stat. provisions and the . . . prior decisions of this Court [Petition, p. 12]," even a cursory reading of the Court's relevant opinions, as were relied upon by the State Appellate Court below, demonstrates that no such conflict exists. In fact,

as is demonstrated below, Petitioner's case is fairly controlled by the clearly established precedents of this Court, and the Court below correctly applied such precedents.

Initially, it must be noted that the only authority of this Court cited by Petitioner is this Court's opinion in *Miranda v. Arizona*, 384 U.S. 436 (1966). While that opinion clearly delineates the responsibility of law enforcement officers to properly apprise those persons held in custody of their privilege against self-incrimination prior to interrogation, its citation by Petitioner in the case at bar begs the question of whether such authority is applicable to Petitioner given the facts of her case. A review of those facts, as set forth in the opinion of the Georgia Court of Appeals and outlined herein above, demonstrates that Petitioner's reliance upon *Miranda* is inapposite.

Petitioner was stopped in her car by a police officer for weaving over the roadway and for traveling below the posted minimum speed. After conducting several field sobriety tests on which Petitioner did poorly, the officer placed Petitioner under arrest and read her the statutorily required implied consent warning, which included the question as to whether she would submit to the state administered chemical test. Petitioner responded in the affirmative.

The Georgia Court of Appeals, in affirming Petitioner's conviction and sentence, properly identified and applied this Court's decision in *Pennsylvania v. Muniz*, 496 U.S. 582 (1990), finding that Petitioner's "verbal response was neither testimonial nor communicative in nature; it was neutral in its effect and thus, not protected by the

privilege against self-incrimination." *Scanlon v. State*, 237 Ga. App. 362, 363, 514 S.E.2d 876, 878 (1999).

In *Muniz*, this Court held that "Miranda does not require suppression of the statements [the driver] made when asked to submit to a breathalyzer examination. . . . [The driver's] statements were not prompted by an interrogation within the meaning of Miranda, and therefore the absence of Miranda warnings does not require suppression of these statements at trial." *Muniz*, 496 U.S. at 604-05. That question was rather within that class of "limited and focused inquiries . . . necessarily attendant to the legitimate police procedure . . . and were not likely to be perceived as calling for any incriminating response." *Id.*, at 605 (cits. and internal punctuation omitted).

The only distinction that can be drawn between Petitioner's case and the factual scenario presented in *Muniz* is that in the case at bar Petitioner agreed to submit to the test, while in *Muniz* the driver refused. *Id.* Presently, the Petitioner urges granting the writ and reversal of the lower court's decision based upon the fact that her "statement" agreeing to take the state-designated chemical test was admitted at trial, without her having been "advised of her *Miranda* rights." Petition, p. 15. Petitioner nowhere addresses why her *agreeing* to take the breathalyzer test should be suppressed, when this Court has specifically held that a driver's *refusal* to submit is admissible. *Id. See also, South Dakota v. Neville*, 459 U.S. 553 (1983) (since submission to blood testing can be compelled, state's decision to permit refusal but comment upon refusal at trial does not violate privilege against self-incrimination).

Ultimately then, the writ must be denied because Petitioner has failed to address why this Court's clear precedents should not be applied to her case. That Petitioner has not even cited, much less addressed, the application of these precedents to her case belies her claims that she "was entitled to be advised of her *Miranda* rights and the failure of the State to do so requires reversal of Petitioner's conviction." Petition, p. 15. In fact, as the Georgia Court of Appeals recognized, this Court's clear precedents demonstrate that Petitioner's premise is unfounded. Thus, the writ should be denied.

II. THIS COURT SHOULD DENY THE WRIT AS PETITIONER'S RELIANCE ON *STATE V. WARMACK* AND *PRICE V. STATE* IS MISPLACED.

In her brief, Petitioner relies on *State v. Warmack*, 230 Ga. App. 157, 495 S.E.2d 632 (1998), and *Price v. State*, 269 Ga. 222, 498 S.E.2d 262 (1998), for the proposition that "*Miranda* must apply . . . because Petitioner was in custody, questioned, gave evidence contrary to her interests and the state used it against her." Petition, p. 14. Respondent, however, submits that *Miranda* does not apply to the instant case, and further, that Petitioner's reliance on these authorities is misplaced.

In *Warmack*, the defendant was stopped by a police officer after being suspected of driving under the influence. 230 Ga. App. at 157. After failing several field sobriety tests administered by the officer, the defendant was placed under arrest and was advised of his implied consent rights. *Id.* The officer administered the Intoxilyzer 5000 breath test which resulted in readings which

were inconsistent with the defendant's poor performance in the field sobriety tests. *Id.* Based on the inconsistency, the officer requested additional testing of the defendant's blood and urine. *Id.*

In holding that the officer had no authority to request additional tests of the defendant, the Georgia Appellate Court relied on O.C.G.A. § 40-5-67.1, which provides that "subject to Code Section 40-6-392, the requesting law enforcement officer shall designate which test shall be administered, provided that the officer shall require a breath test or a blood test and may require a urine test." The court determined that the "plain statutory language [of O.C.G.A. § 40-5-67.1] authorizes the requesting official to select a breath test and a urine test or a blood test and a urine test." *Id.* at 158. Thus, once the officer selects the type of test to be performed, the statute does not authorize the officer to require the defendant to submit to further testing. *Id.* Having determined that the officer was outside the scope of his statutory authority, the Georgia Appellate Court held that the "request to undergo further State testing must be preceded by *Miranda* warnings." *Id.* at 158-59.

Petitioner also relies on *Price v. State* for the proposition that "*Miranda* must apply." Petition, p. 14. In *Price*, the defendant submitted to a field sobriety test after being advised by a police officer that she was going to jail for driving under the influence. 269 Ga. at 225. The Georgia Appellate Court held that, under these circumstances, because the defendant was in custody, *Miranda* should have been given and that the evidence of the field sobriety test should have been suppressed under state law. *Id.* Importantly, however, the court held that because

field sobriety tests are not testimonial in nature, a federal constitutional challenge to the admissibility of such evidence would fail, as the prohibition contained in the United States Constitution applies only to evidence that is testimonial. *Id.* Thus, Petitioner's reliance upon *Price* is misplaced.

Petitioner, like the defendant in *Warmack,* was in custody at the time she was asked to submit to a chemical test. Unlike *Warmack,* however, the officer who arrested Petitioner requested her to submit to only one test rather than multiple tests. In so doing, the officer was within his statutory authority, pursuant to O.C.G.A. §§ 40-5-55 and 40-5-67.1, such that *Miranda* would not apply. Accordingly, Petitioner's reliance upon *Warmack* is misplaced.

In sum, the Georgia Appellate Court authorities relied upon in the instant petition fail to support Petitioner's assertion that her Fifth and Fourteenth Amendment rights were violated. As set forth above, Petitioner's consent to submit to the state's chemical breath test is not testimonial and thus, *Miranda* does not apply. Thus, the writ should be denied.

CONCLUSION

WHEREFORE, based on the foregoing, Respondent prays that this Court deny the instant Petition for Writ of Certiorari.

Respectfully submitted,

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